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U.S. Citizenship
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Services

FILE: SRC 02 260 50031 Office: TEXAS SERVICE CENTER Date: SEP 09 2004

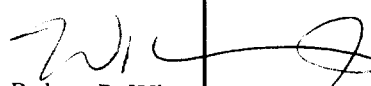
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration
and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president-general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability corporation organized in the State of Florida that invests in commercial construction. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Lima, Peru. The petitioner was originally granted one year to open a "new office," and now seeks to extend the beneficiary's stay for two years.

The director, noting a discrepancy in the amount of individuals employed by the petitioner, stated that the petitioner did not employ subordinate individuals who would relieve the beneficiary from performing non-qualifying, day-to-day operations of the business. The director therefore concluded that the petitioning organization, as a new U.S. office, would not support the beneficiary in a primarily managerial or executive position.

On appeal, counsel asserts that the evidence provided proves that the beneficiary's employment meets the criteria for executive capacity. Counsel also states that the beneficiary supervises professionals, including an architectural consultant, project managers, and subcontractors, and contends that the petitioner has met the requirements for a L-1A visa.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (1) Manages the organization, or a department, subdivision, function, or component of the organization;
- (2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (1) Directs the management of the organization or a major component or function of the organization;
- (2) Establishes the goals and policies of the organization, component, or function;
- (3) Exercises wide latitude in discretionary decision-making; and
- (4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On September 2, 2002, the petitioner filed the nonimmigrant petition noting that the beneficiary, as president and general manager, would primarily be responsible for investing Peruvian funds in commercial construction projects, evaluating prospective business ventures, reviewing architectural plans, and performing cost analyses of prospective projects. In an appended letter dated August 15, 2002, the petitioner stated that the beneficiary "has been entrusted with over two million dollars in investment capital," and has played a key role in the petitioner's expansion plans. The petitioner submitted four "Owner and Construction Manager" Agreements, in which the petitioning organization is identified as the construction manager, as evidence of the petitioner's participation in construction projects in the United States. The agreements also outlined the petitioner's responsibilities and duties as the construction manager.

In a request for evidence dated October 3, 2002, the director asked that the petitioner submit a list of all employees in the U.S. entity, including their job titles, and the petitioner's most recent corporate income tax return. Counsel for the petitioner responded on November 19, 2002 providing a list of the following six individuals employed by the petitioner: the beneficiary as president-project director; an individual in accounting; an office manager-secretary; two project managers; and an architectural consultant. The petitioner also provided a "sample" list of nine subcontractors. In addition, the petitioner submitted financial documentation, including a Statement of Assets, Liabilities, and Equity, a corporate balance sheet, and Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income.

In a decision dated December 31, 2002, the director noted that the beneficiary's chief responsibility of overseeing the petitioner's investment capital is not "inherently executive in the traditional sense of the word." The director stated that the petitioner failed to demonstrate that the beneficiary would manage or direct the management of a department, subdivision, function, or component of the organization, or that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees. The director therefore concluded that the beneficiary would not be engaged in primarily executive duties "as the business has not expanded to the point where the services of a full-time, bona fide president/general manager would be required." The director also identified an inconsistency in the record pertaining to the number of individuals employed by the petitioning organization, stating that the nonimmigrant petition indicated two employees while the petitioner identified six employees in its response to the director's request for evidence. Accordingly, the director denied the petition.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) failed to review the entire record, which counsel asserts proves that the beneficiary meets the qualifications of an executive. Counsel

states that the beneficiary negotiated and purchased for the petitioner a membership interest in a separate U.S. company, which counsel indicates “clearly demonstrates that [the beneficiary] directs the management of the project management department.” Counsel also contends that the record establishes that the beneficiary supervises professionals, specifically the petitioner’s architectural consultant, project managers, and independent subcontractors. Counsel explains that the architectural consultant reports to the beneficiary regarding the contractors’ performance, while the project managers ensure that the subcontractors’ work is performed in a timely and professional fashion. Counsel refers to *Matter of Shaw*, 11 I&N Dec. 277 (BIA 1965), as evidence that the beneficiary “has proven that he is the supervisor of other professionals and has shown that he has met his eligibility for the benefit sought.”

On review, the record does not demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

The petitioner does not clarify whether the beneficiary has been and would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ a beneficiary as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. If a petitioner is representing the beneficiary is both an executive and a manager, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In the present matter, the petitioner stated in its August 15, 2002 letter that the beneficiary is employed in a managerial capacity. However, on appeal, counsel states that the evidence “overwhelmingly proves” the beneficiary’s position in an executive capacity, which includes “directing the management of the project management department.” In contrast, counsel also states that the beneficiary controls and supervises professionals, which is a criterion for managerial capacity. *See* § 101(a)(44)(A) of the Act. It appears that counsel is incorrectly using the terms managerial and executive capacity interchangeably. The vague job descriptions provided by the petitioner and counsel fail to both specifically identify the job responsibilities of the beneficiary and establish that such duties satisfy employment in an executive or managerial capacity, or both. *See* 8 C.F.R. § 214.2(l)(3)(ii). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Additionally, the record does not conclusively establish that the petitioner employs subordinate employees who are supervised, controlled or directed by the beneficiary. The director correctly observes a discrepancy in the evidence offered by the petitioner. On the nonimmigrant petition, the petitioner noted that the petitioning organization employed two individuals at the time of filing, yet identified six employees in its response to the director’s request for evidence. There is no documentation in the record explaining this inconsistency, nor did counsel offer any explanation on appeal. It is therefore impossible to determine whom the petitioner employed at the time of filing the petition, and to evaluate whether the beneficiary was actually performing in a managerial or executive capacity. It is incumbent upon the petitioner to resolve any

inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 193.

Furthermore, the record does not substantiate counsel's claim on appeal that the beneficiary supervises or controls independent contractors. CIS recognizes that independent contractors may be considered in determining whether the beneficiary supervises others in a managerial or executive capacity. *See* 9 FAM 41.54 N8.2-1. Evidence, however, must be provided to establish that the beneficiary directs and controls the work of these individuals. *Id.* In the present matter, the record does not contain sufficient documentation demonstrating the beneficiary's control over how the claimed independent contractors perform their job duties. The "Owner and Construction Manager" Agreements submitted by the petitioner provide limited information regarding the services and obligations of the petitioning organization as construction manager. Article 2.3.3 of the Agreement states that the petitioner "shall provide administrative, management and related services to coordinate scheduled activities" of the contractors, owner and architect in order to manage the project in accordance with the projected costs and schedule. However, article 2.3.15 adds:

With respect to each Contractor's own Work, the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences, procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's responsibility under the Contract for Construction. The Construction Manager shall not be responsible for a Contractor's failure to carry out the Work in accordance with the respective Contract Documents. The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees, or any other persons performing portions of the Work not directly employed by the Construction Manager.

According to the Agreement, the beneficiary does not exercise authority over the contractor's actual performance. Absent additional evidence, the beneficiary cannot be deemed to be directing or supervising the independent contractors in a managerial or executive capacity.

Counsel incorrectly refers to *Matter of Shaw* as evidence that the beneficiary qualifies as a manager or executive. *Matter of Shaw* involves a petition under section 101(a)(15)(H) of the Act, in which the petitioner is seeking classification of the beneficiary as a nonimmigrant in a specialized occupation. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Matter of Shaw*. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 193.

Based on the foregoing, the beneficiary has not been and would not be employed in the petitioning organization in a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.